SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

NO. 73-1048

DR. N. JAY ROGERS

v.

DR. JACK BURTON, ET AL

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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IN THE

Supreme Court of the United States

NO._____

DR. N. JAY ROGERS

v.

DR. JACK BURTON, ET AL

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioner, Dr. N. Jay Rogers, prays that a writ of certiorari issue to review the opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin and the decision of the Supreme Court of Texas rendered in these proceedings on December 5, 1973.

OPINIONS BELOW

The opinion of the Court of Civil Appeals, Third Supreme Judicial District of Texas, is reported at 496 S.W.2d 673 and appears at Appendix A, infra. Application for writ of error to the Supreme Court of Texas was duly presented and refused. Motion for rehearing upon application for writ of error was overruled December 5, 1973 and appears at Appendix B, infra.

JURISDICTION

The order or judgment of the Supreme Court of Texas overruling application for writ of error was entered December 5, 1973. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

The question presented is whether under the Fourteenth Amendment a state statute may exempt from its restrictive terms those optometrists who lease office space from a fee owner and not exempt those optometrists who lease space from longtime tenants of fee owners.

STATUTES INVOLVED

The statute involved is Article 4552, Revised Civil Statutes of Texas, and contains like exemptions in issue in §§ 5.11(2)(b); 5.13(k); 5.14(i); and 5.15(d).

Relevant portions of the statute are attached as Appendix C. It provides an exemption extending to "any optometrist practicing optometry * * * by virtue of an existing or negotiated lease in effect on April 15, 1969."

STATEMENT OF THE CASE

This is a declaratory judgment suit brought in the state court of Texas to determine the meaning of portions of the Texas Optometry Act. Acts 1969, 61st Leg., p. 1298, Ch. 401 (Article 4552, et seq., Revised Civil Statutes of Texas).

Petitioner, Dr. N. Jay Rogers, is a licensed optometrist practicing under the laws of the State of Texas. Respondents are members of the Texas Optometry Board as same is defined by the Texas Optometry Act.

The Texas Optometry Act was adopted in 1969. The new Act completely supplanted the old and imposed

significantly different regulation of certain non-patient aspects of the optometric practice. Therefore, a "grandfather clause" was included. This grandfather clause exempted from certain provisions of the Act "any optometrist practicing optometry * * * by virtue of an existing or negotiated lease in effect on April 15, 1969." (§§ 5.11 (2)(b), 5.13(k), 5.14(i), and 5.15(d), Art. 4552, Revised Civil Statutes of Texas).

The Texas appellate courts found that petitioner as "sublessee," leased the premises in question on December 1, 1968 (Op. p. 2; Appendix A). This "sublease" bore an expiration date of June 30, 1979.

The sublease was based upon an original lease from the landowner extending from 1961 to June 30, 1971. The courts found this original landowner's lease was renegotiated and extended in December 1969.

Thus, the court below found factually that petitioner, as an optometrist, was occupying premises by virtue of a sublease in effect April 15, 1969 (the operative date in the grandfather clause). However, the courts found that the original landowner or "base lease" extending beyond June 1971 was not in effect April 15, 1969.

The court then held that although the optometrist (petitioner) occupied premises by virtue of a lease in effect on April 15, 1969, such optometrists "were not entitled to the exemption after the termination of the primary, or base, lease from the lessor covering such premises that was validly in effect on April 15, 1969."

Thus, the Texas courts held that an optometrist who leases office space from a fee owner is treated differently from one who is a longtime tenant of a fee owner.

REASONS FOR GRANTING THE WRIT

December 5, 1973 this court dealt with state regulation of business practices of the pharmacy profession. *North Dakota State Board of Pharmacy v. Snyder's Drug-stores, Inc.*, No. 72-1176 (December 5, 1973), 42 L.W. 4035.

May 7, 1973 this court dealt with state regulation of optometry. *Gibson v. Berryhill,* No. 71-653 (May 7, 1973);____U.S.____,36 L.Ed.2d 488.

Both decisions were determined under the Fourteenth Amendment.

Petitioner supports state regulation of the optometric profession as a proper and lawful exercise of the police power.

Petitioner supports the exemptions contained in the Texas Optometry Act of 1969 because the exemptions protect existing contract right and duties of optometrists who are legally bound upon leases *negotiated* or *executed* prior to April 15, 1969.

Petitioner agrees that the Legislature could have lawfully omitted any provision for exemption from the Act. However, when a statutory exemption is granted, it must be applied free from impermissible discrimination.

Here, the Act is lawful on its face, exempting any "*optometrist* occupying premises by virtue of a lease in effect April 15, 1969." Petitioner is an optometrist. His contract of occupancy is commonly called a "sub-lease." A sub-lease is a lease. *Random House Dictionary,* (Unabridged, 1967).

The use of the term sub-lease is descriptive of where in a chain of title a party may be; it is not definitive of

any legal relationship, except that as between the parties it is a valid and binding contract.

The Texas courts have held that the statutory exemption extends to optometrists who are tenants of fee owners on the operative date but not to optometrists who lease from longtime tenants of fee owners.

As petitioner said in his application for writ of error to the Supreme Court of Texas, (p. 15), such a construction of the Act destroys, not protects, the existing contract rights of optometrists and is a legislative absurdity which is discriminatory.

Furthermore, in the language of petitioner before the Texas Supreme Court on Motion for Rehearing, (p. 2):

> "Such construction results in a legislative absurdity and becomes confiscatory. As such, it deprives Petitioner of equal protection of the laws. It discriminates among competitive groups within a profession, penalizing those optometrists who are 'subleasees' and favoring those who are mere 'leasees'.
>
> Rather than protect the optometrist and his contract rights, it punishes one class and unduly favors another. Operating in the competitive milieu where one professional organization enjoys an impermissible discriminatory advantage, such section of the Act violates Petitioner's Fourteenth Amendment rights of equal protection. Gibson v. Berryhill,____U.S.____, 36 L.Ed.2d 488 (1973)."

Invidious discrimination by state action under the guise of police power falls before the Fourteenth Amendment. This is particularly important in the healing arts just as in education. It must be eliminated "root and branch." *Green v. New Kent County,* 391 U.S. 430 at 437-438 (1968).

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinions of the Supreme Court of Texas and Court of Civil Appeals for the Third Supreme Judicial District of Texas.

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOULIN
1400 San Jacinto Building
Beaumont, Texas

By_____
ROBERT Q. KEITH
Counsel for Petitioner

December 28, 1973

CERTIFICATE OF SERVICE

I, Robert Q. Keith, one of the attorneys for petitioner, do hereby certify that I am admitted to practice before the Supreme Court of the United States; that all parties required to be served in this matter have been served; and that service was accomplished by depositing three copies of this Application for Writ of Certiorari in a United States Post Office, with first class postage prepaid, addressed to counsel for respondent, The Honorable Jack Sparks, Assistant Attorney General of Texas, State Capitol Building, Austin, Texas, on this the 28th day of December, 1973.

_____
ROBERT Q. KEITH

APPENDIX "A"

IN THE

Court of Civil Appeals

THIRD SUPREME JUDICIAL DISTRICT OF TEXAS
AT AUSTIN

No. 12,001

DR. N. JAY ROGERS, *Appellant*

v.

DR. JACK BURTON, ET AL, *Appellees*

FROM THE
DISTRICT COURT OF TRAVIS COUNTY
200th JUDICIAL DISTRICT

No. 194,274

HONORABLE CHARLES D. MATHEWS, *Judge*

This is a lawsuit brought by Dr. N. Jay Rogers, an optometrist practicing in Beaumont, against the members of the Texas Optometry Board, with its principal office in Austin.

By his suit plaintiff sought a declaratory judgment construing a specified portion of Article 4552-5.11, Vernon's Anno. Civ. Statutes, a part of the Texas Optometry

Act, which became effective September 1, 1969. (Acts 1969, 61st Leg., p. 1298, ch. 401).

The general effect of subsection (b) of Article 4552-5.11 is to afford certain optometry establishments occupying premises under leases in effect on April 15, 1969, an exemption for a limited period of time from provisions of subsections (a) (1) and (2) prohibiting use by optometrists of specified merchandise and advertising displays and specified types of colored and neon lights and signs in the form of eyes.

Plaintiff contended that because of the nature of a lease he held on certain premises in Dallas his operation was entitled to benefit of the exemption provided in the statute. The Texas Optometry Board and its members contended that the lease upon which plaintiff must rely expired June 30, 1971, and the statutory exemption did not apply to the premises in Dallas beyond that date.

The trial court entered judgment for defendants, the Optometry Board and its members, and Plaintiff Rogers has appealed. We will affirm judgment of the trial court.

The exemption with which we are concerned is stated in full in subsection (b) of Article 4552-5.11:

"(b) Any optometrist practicing optometry on or after April 15, 1969 in a manner, or under conditions, contrary to any of the provisions of this Section 5.11 by virtue of occupying premises under an existing or negotiated lease in effect on April 15, 1969, shall not be subject to the provisions of this Section 5.11 until the expiration of the primary term of the lease, or until January 1, 1979, which ever occurs sooner, but no such lease may be extended beyond the primary term by the exercise of any option. Provided, however, that as to any such lease ex-

piring on or before June 1, 1970, such lease may be continued in effect until June 1, 1970."

The Dallas premises at issue were leased by Oak Cliff Savings and Loan Association on March 8, 1961, to Rogers Bros., Inc., a Texas corporation. Under this contract the lease would expire June 30, 1971.

Rogers Bros., Inc., as lessee of the premises, subleased the premises on March 8, 1961, to a partnership (Rogers Bros.) composed of Ben J. Rogers, S. J. Rogers, N. Jay Rogers, and V. J. Rogers.

Subsequently, on December 1, 1968, the partnership (Rogers Bros.) assumed the role of lessor and subleased the same premises to Texas State Optical, another partnership composed of N. Jay Rogers, the appellant, and S. J. Rogers, also an optometrist.

Early in 1970, after the Texas Optometry Act became effective in September of 1969, Ben J. Rogers, one of the Rogers Bros. partners and a brother of the appellant, filed an affidavit in compliance with instructions of the Optometry Board, together with the sublease between Rogers Bros., the partnership, and Texas State Optical, the partnership composed of appellant and S. J. Rogers.

The sublease filed by Ben J. Rogers recited that it was based on the original lease of March 8, 1961, between Oak Cliff Savings and the corporation, Rogers Bros., Inc., and was also based on the prior sublease between the corporation (Rogers Bros., Inc.) and the partnership called Rogers Bros. The prior sublease purportedly was executed December 1, 1968. The sublease Ben J. Rogers filed with the Optometry Board further recited that it was based also on a new base lease executed by Oak Cliff

Savings and the corporation, Rogers Bros., Inc., purportedly dated December 1, 1968, and on a new sublease between the Rogers Corporation and the Rogers partnership, this lease also dated December 1, 1968. This latter sublease bore an expiration date of June 30, 1979, six months beyond the limit set for the exemptions found in subsection (b) of Article 4552-5.11.

The Optometry Board granted an exemption to appellant, after the affidavit and leases mentioned above were filed by Ben J. Rogers. Subsequently, upon further investigation, a majority of the Board concluded that the so-called renegotiated base lease between Oak Cliff Savings and the Rogers Bros., corporation, upon which the sublease extension to June 30, 1979, was based, was not made in December of 1968, but was made in 1969, subsequent to the cut-off date of April 15, 1969, provided in the statute, and therefore would not support the exemption granted. Rather than call a meeting to consider revoking appellant's exemption, the Board agreed with appellant to withhold administrative action to afford appellant opportunity to bring this declaratory judgment action.

The Optometry Board's intended move to call a meeting to consider revocation of appellant's exemption stemmed from testimony by deposition of the real estate agent in Dallas who handled negotiations and closing of the lease between Oak Cliff Savings and the Rogers corporation. The agent testified that negotiations which led to making a new base lease began in October of 1969 and culminated in December of that year. The agent also furnished correspondence he had with Rogers Bros., Inc., after the lease was executed in December, after which, sometime in February of 1970, new signature

pages were substituted in all four copies of the lease, which showed the date of signatures as December 1, 1968, instead of 1969.

The testimony of the agent and the correspondence he furnished were introduced in the trial court. The agent's copy of the lease was introduced, that copy showing the date of execution changed from December 1, 1968 to 1969. The agent testified by deposition that he made the change from 1968 to 1969 because in fact the lease was entered into in 1969 and not the year before.

The trial court entered judgment decreeing that (1) the specific premises in Dallas were not entitled to the exemption afforded under Article 4552-5.11 and (2) all other optometric premises being occupied by virtue of similar leases and subleases were not entitled to the exemption after the termination of the primary, or base, lease from the lessor covering such premises that was validly in effect on April 15, 1969.

It is elementary that the right of possession of a sublessee, as against the original lessor, terminates with expiration of the original lease. Sinclair Refining Co. v. Womack, 66 S.W.2d 402, 405 (Tex. Civ. App.—Eastland 1933, no writ). No privity of contract exists under a sublease between the sublessee and the original lessor. Zeidman v. Davis, 161 Tex. 496, 342 S.W.2d 555, 558 (1961).

If Rogers Bros., Inc., subleased the Dallas premises to the Rogers partnership on December 1, 1968, the sublease to expire June 30, 1979, the extension beyond the life of the base lease from Oak Cliff Savings to the Rogers corporation was ineffectual past June 30, 1971. Under the facts of this record, as impliedly found by the trial

court, appellant was occupying the Dallas property on April 15, 1969, by virtue of a base lease which would expire June 30, 1971, and the sublease of December 1, 1968, purportedly extending to June 30, 1979, was ineffectual to qualify appellant under the exemption of Article 4552-5.11(b).

> The statute affords an exemption "by virtue of occupying premises under an existing or negotiated lease in effect on April 15, 1969," and does not refer to subleases. We find it was the intent of the Legislature in enacting the statute to provide that the base lease under which the optometrist occupies property would be the controlling lease in determining the right to exemptions. It will not be presumed by the courts that the Legislature intended to allow subleases to confer rights upon the occupying tenant in excess of rights established under the terms of the original or base lease.

We are persuaded for another reason that the trial court correctly used the base lease as the measure of appellant's claim to an exemption under the statute. It is undisputed in the record that the Texas Optometry Board has consistently used the base lease, being the original lease between the owner and his lessee, as the instrument referred to in the exemption statute, and that all optometrists in this state, except those associated with Texas State Optical, adopted and used the Board's precept that the base lease was controlling of the exemption. If the meaning of a statute is doubtful or the language ambiguous, the construction placed on the statute, followed by consistent adherence to such construction, by an administrative agency of the State charged with administration of the enactment is entitled to weight with the

courts. Calvert v. Kadane, 427 S.W.2d 605, 608 (Tex. Sup. 1968); Heard v. City of Dallas, 456 S.W.2d 440, 444 (Tex. Civ. App.—Dallas 1970, writ ref. n.r.e.); Tarry Moving and Storage Co. v. Railroad Commission, 359 S.W.2d 62, 67 (Tex. Civ. App.—Austin 1962, aff'd 367 S.W.2d 322).

The judgment of the trial court is affirmed.

TRUEMAN E. O'QUINN,
Associate Justice

Affirmed
Filed: June 20, 1973

APPENDIX "B"

IN THE

Supreme Court of Texas

October 24, 1973

No. B-4164.

DR. N. JAY ROGERS

vs.

DR. JACK BURTON ET AL.

From Travis County, Third District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Third Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Dr. N. Jay Rogers, and surety, The Aetna Casualty & Surety Company, pay all costs incurred on this application.

December 5, 1973.

No. B-4164.

DR. N. JAY ROGERS

vs.

DR. JACK BURTON ET AL.

From Travis County, Third District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 11th day of December, 1973.

GARSON R. JACKSON, Clerk

By EUGENE CERVENKA, Deputy.
Eugene Cervenka

APPENDIX "C"

Art. 4552—5.11 Window displays and signs

(a) It shall be unlawful for any optometrist:

(1) to display or cause to be displayed any spectacles, eyeglasses, frames or mountings, goggles, lenses, prisms, contact lenses, eyeglass cases, ophthalmic material of any kind, optometric instruments, or optical tools or machinery, or any merchandise or advertising of a commercial nature in his office windows or reception rooms;

(2) to make use of or permit the continuance of any colored or neon lights, eyeglasses or eye signs, whether painted, neon, decalcomania, or any other either in the form of eyes or structures resembling eyes, eyeglass frames, eyeglasses or spectacles, whether lighted or not, or any other kind of signs or displays of a commercial nature in his optometric office.

(b) Any optometrist practicing optometry on or after April 15, 1969 in a manner, or under conditions, contrary to any of the provisions of this Section 5.11 by virtue of occupying premises under an existing or negotiated lease in effect on April 15, 1969, shall not be subject to the provisions of this Section 5.11 until the expiration of the primary term of the lease, or until January 1, 1979, whichever occurs sooner, but no such lease may be extended beyond the primary term by the exercise of any option. Provided, however, that as to any such lease expiring on or before June 1, 1970, such lease may be continued in effect until June 1, 1970.

Acts 1969, 61st Leg., p. 1298, ch. 401, § 5.11, eff. Sept. 1, 1969.